No. 80—693

In The

Supreme Court of the United States

OCTOBER TERM, 1980

SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY, INC., *et al.*

Petitioners

v.

ALEX J. AND MARY GARCIA, *et al.*

Respondents

ON WRIT OF CERTIORARI TO THE THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

For several years the State of Ohio has licensed facilities for the care of mentally retarded persons, Ohio Revised Code Section 5123.18, as effective on October 31, 1977. The new Section 5123.18 was a major portion of Amended Substitute Senate Bill No. 71, making several additions and changes to the existing Section 5123.18: a series of definitions were added under sub-section (A); a notification procedure added under subsection (C); and an exemption for licensed facilities from compliance with

municipal zoning ordinances under subsections (D), (E) and (G). It is these "zoning" subsections which were at issue in the case below. [1]

[1] Effective July 1, 1980, 5123.18 has been renumbered as 5123.19 by Ohio Am. Sub. H.B. 900. Ohio Rev. Code Ann. 5123.19 (Page's Leg. Bull. at 338, 1980). References in this petition will be to Ohio Rev. Code Ann. 5123.18 (Page's Supp. 1979).

The portions of R.C. 5123.18 as enacted which are germane to this discussion are as follows:

"(A) As used in this section and section 5123.19 of the Revised Code:

"(1) 'Residential facility' means a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721 of the Revised Code or the home of a relative or legal guardian in which a person with a developmental disability resides.

"(2) 'Developmental disability' means a disibility that originated before the attainment of eighteen years of age and can be expected to continue indefinitely, constitutes a substantial handicap to the person's ability to function normally in society, and is attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior or requires similar treatment and services.

"(3) 'Family home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for not more than eight persons with developmental disibilities.

"(4) 'Group home' means a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for at least nine but not more than sixteen persons with developmental disabilities.

"(B) Every person desiring to operate a facility shall apply for licensure of the facility to the chief of the division of mental retardation and developmental disabilities.

"***

"(D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are imposed upon all single-family residences within the district or zone.

"(E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision.***

In November 1977, Petitioner, Siffrin Residential Association, purchased a residence at 1532 Yale Avenue, N.W., Canton, for the proposed use as a "residential facility" to house eight or fewer "developmentally disabled" female adults. This site is in an area zoned R-2 within Chapter 1137 of the Canton City Ordinances, which zoning classification restricts the sites to one and two-family dwellings. [2]

"(F) This section does not prohibit a political subdivision from applying to residential facilities nondiscriminatory regulations requiring compliance with health, fire, and safety regulations and building standards and regulations.

"(G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification."

2 The sections of Chapter 1137 of the Canton city zoning ordinance which are pertinent to this discussion are as follows:

"1137.02 Permitted Uses.

"Principal permitted uses are as follows:

"(a) Any use permitted in the R-1 District

"(b) Two-family dwellings."

Within the zoning ordinances of Canton are the following definitions:

"1123.24 Dwelling.

" 'Dwelling' means any building or portion thereof, which is designed for or used for residential purposes; including one and two-family and multi-family, but not including a tent, tourist cabin, trailer, trailer coach, hotels, motels, boarding houses or lodging houses.

"1123.25 Dwelling Unit.

" 'Dwelling unit' means a group of rooms arranged, maintained or designed to be occupied by a single-family (see definition of family), and consists of a complete bathroom, complete kitchen or kitchenette; and facilities for living, sleeping and eating. All of the facilities are to be located in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family.

Respondents, Alex J. and Mary L. Garcia, are owners of a residence located adjacent to the proposed facility, in which residence they have lived for approximately 25 years.

In March 1978, Siffrin made application to the Ohio Department of Mental Health and Mental Retardation, pursuant to R.C. 5123.18, for licensure of the home. The department, pursuant to law, issued a notice to the Canton Planning Commission, Canton Board of Zoning Appeals and the Clerk of Canton City Council, prior to the publication of the required legal notice. Letters of objection to the proposed location were filed by Mr. Garcia and another neighbor. Subsequently, a petition was signed by some 50 residents in the neighborhood, objecting to the location of this facility.

The Canton Zoning Department also filed a letter of objection, stating that the proposed use was neither a permitted use nor a conditional use in a R-2 district, and that the home as pr osed could only qualify as a "boarding house" or "rooming house," a conditional use in a R-4 residential district.

The Department of Mental Health and Mental Retardation reviewed the objections, including that of the city of Canton, and determined that zoning restrictions imposed by the ordinance were superseded

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"1123.27 Dwelling, Two-family.

" 'Two-family dwelling' means a building designed for or used exclusively for residence purposes by two families living independently of each other.

"1123.30 Family.

" 'Family' means one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, motel, hotel, fraternity or sorority house."

by the effect of R.C. 5123.18 and, more specifically, subsection (D) thereof, which, in pertinent part, states as follows:

> Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision.

This present cause was thereafter instituted on April 21, 1978, by the filing of the complaint by the Garcias, in the Court of Common Pleas of Stark County, seeking to enjoin Siffrin from establishing a "family home" at 1532 Yale Avenue, and requesting that R.C. 5123.18 (D) be declared unconstitutional. Respondents also requested that Drs. Moritz and Cannon of the Department of Mental Health and Mental Retardation be enjoined from licensing the home.

Respondent, City of Canton, filed a complaint against the same defendants, also seeking to enjoin the licensing and establishment of this "family home," and to have R.C. 5123.18 (D) declared unconstitutional.

Petitioner, Ohio Legal Rights Service, moved and was granted leave to intervene as a party-defendant. After a hearing, a preliminary injunction was granted to the respondents enjoining the director from issuing a license for this operation.

Upon trial of this matter, evidence was adduced showing that Siffrin is a corporate entity controlled by a board of directors; that the corporation has at least one other "residential facility" in operation; and that the overall operations of this proposed facility, as well as the currently operating facility, are under the control of a director. The staff that was to be brought into this proposed operation, in addition to the director, would be a married couple who would reside on the premises, two other women working fulltime, and other special purpose training staff as needed to carry out the "habilitation services" and "personal care" as provided by statute and

regulations. "Habilitation," as defined in R.C. 5123.68 (G), "means the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, social, and vocational efficiency. Habilitation includes but is not limited to programs of formal, structured education and training ***."

The director and admissions committee screen the applicants for the home, and individual month-to-month contracts are entered into with either the individual, member of the family or guardian, or the State of Ohio if the person was institutionalized. The amount charged for the services to be given the individual varies with the physical or educational needs or requirements of the individual. The clients are persons with one or more "developmental disabilities"; all are characterized by deficiencies in adaptive behavior, in socialization, and in life skills, and some have both neurological and organic disabilities or damage.

The budget for this facility would be approximately $61,000, "broken down ***(into) direct care, indirect staff cost for secretarial, administrative, administrative non-personnel cost, telephone, travel, things of this nature, food, mortgage, utilities, depreciation, insurance, things like this." There is a rather complex funding of residents, including federal and state funds for room and board reimbursement.

Thereafter, on August 18, 1978, Judge DeHoff of the Court of Common Pleas of Stark County, issued his Findings of Fact and Conclusions of Law, finding that the proposed use was not a "family" within the meaning of Canton's zoning ordinances and consequently not a permitted or conditional use in an R-2 zone; that Ohio Revised Code 5123.18 (D) and (E) did not supercede Canton's zoning ordinances under Ohio Constitutional

Law; and that Ohio Revised Code 5123.18 (D) and (E) were in fact null and void under both Ohio and federal constitutional law. Petitioners were permanently enjoined from operating their home and/or licensing it pursuant to the state law.

Judgment was accordingly entered for the Garcias and the city of Canton. Siffrin, Drs. Moritz and Cannon, and the Ohio Legal Rights Service thereafter appealed the decision of the Court of Common Pleas to the Court of Appeals. The members of that court rendered their opinion and judgment in March 1979, reversing the judgment of the trial court on all issues.

The Garcia's and the City of Canton thereafter filed their appeal to the Ohio Supreme Court, which rendered its decision on July 30, 1980, reversing the decision of the Court of Appeals. The headnotes to the Ohio Supreme Court decision provide as follows:

> 1. A "family home," as defined in R.C. 5123.18 (A) (3), is not a "family" use, as defined in the Canton city zoning ordinance, and is not a permitted use in the R-2 zoned district under such ordinance.
> 2. The enactment of zoning laws by a municipality is an exercise of the "police power," rather than an exercise of the power of "local self-government," as granted by Section 3, Article XVIII of the Ohio Constitution.
> 3. R.C. 5123.18 (D) and (E) are not "general laws" of the state within the meaning of Section 3, Article XVIII of the Ohio Constitution; therefore, Chapter 1137 of the Canton city zoning ordinance, which prohibits a "family" use as contemplated by R.C. 5123.18 is not unconstitutionally in conflict with a "general law" of the state.

4. R.C. 5123.18 (D), (E) and (G) are "special laws" in violation of Section 26, Article II of the Ohio Constitution, and are therefore unconstitutional. 63 Ohio St 2d at 259.

The decisions of the Court of Common Pleas, Court of Appeals, and Ohio Supreme Court are not reproduced herein. Reference is made to the Appendix of Petitioners' Petition for Writ of Certiorari for full copies of these opinions.

REASONS FOR DENYING THE WRIT

1. THE FEDERAL QUESTION PRESENTED IN PETITIONERS' WRIT OF CERTIORARI WAS NOT ADEQUATELY RAISED OR PRESERVED IN THE COURTS BELOW.

Respondents question the sufficiency of the raising and preservation in the courts below of the federal question herein presented. The case in the Ohio courts was tried solely on Respondents' challenge to the constitutionality of Ohio Revised Code 5123.18, and the issue of whether or not that state statute superseded local zoning.

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3. Assignment of error No. II of Petitioner, Ohio Legal Rights Service, read as follows:

> The lower court erred in excluding the proposed home from the R-2 zoning district because such an interpretation and application of the Canton Zoning Ordinance would violate Sections 1, 16 and 19 of Article I of the Ohio Constitution, the due process and equal protection clause of the 14th Amendment to the United States Constitution, and Chapter 4112, Ohio Revised Code.

The Court of Appeals ruled on Petitioner's Assignment of Error No. II as follows:

> This assignment of error is well taken. The Canton zoning law applied to prohibit the Siffrin home in an R-2 district is unconstitutional. Article 1, Section 19, limits the exercise of police powers, including zoning regulations, to that which has a substantial relation to the public health, morals, safety or public welfare. Youngstown v. Kahn Bros. Building Co. (1925), 112 Ohio St. 654. A zoning ordinance which forfeits an owner's rights or deprives the owner of the free use of his property, or which is unreasonably applied to exclude an institutional home in a residential neighborhood, violates Article 1, Section 19, Ohio Constitution. State, ex rel. Synod of Ohio v. Joseph (1942), 139 Ohio St. 229. Cf. Women's Kansas City St. Andrew Soc. v. Kansas City (8th Cir. 1932), 58 F. 2nd 593; Village of University Hts. v. Cleveland Jewish Orphans' Home (6th Cir. 1927), 20 F. 2d 743.

Petitioners in their pleadings in the trial court did not seek declaratory or injunctive relief against Canton's zoning ordinance and no findings were made either in favor of or against the constitutionality of the Canton zoning ordinance by the trial court. *See* Findings of Fact and Conclusions of Law of the Common Pleas Court of Stark County, Ohio, set forth at Appendix A-46 of the Petition for Writ of Certiorari.

The consitutionality of the application of the Canton Zoning Ordinance to prohibit the Siffrin home from the City's R-2 district was first raised in the Court of Appeals in one assignment of error only; [3] and subsequently again in the Ohio Supreme Court, again on one assignment of error only. [4] Nowhere, however, was the question presented herein specifically raised.

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4. Assignment of Error No. 8, of Respondents, read as follows:

> Application of the city of Canton's zoning ordinance to prohibit the proposed use of the Siffrin Residential Association's 'family home' in an R-2 district is a constitutional exercise of the city's police powers.

The Supreme Court of Ohio ruled on Respondents' Assignment of Error No. 8 as follows:

> Local comprehensive zoning plans have long been held to be a valid exercise of governmental planning and control of land use for benefit of public health, safety, morals, and general welfare. *Village of Euclid v. Ambler Realty Co., supra.* The various zoning provisions, which set forth certain prohibitions, restrictions, or limitations upon the free utilization and enjoyment of one's lands must be a part of a reasonably comprehensive plan for the development of the community. *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1; *Village of Euclid v. Ambler Realty, supra.*
>
> A zoning ordinance shown to have a substantial relation to the public health, morals or safety, and not to be arbitrary or discriminatory in its operation or effect, will be upheld as a proper constitutional exercise of the police power of local government.

2. THE QUESTION PRESENTED BY PETITIONERS' WRIT OF CERTIORARI LACKS FACTUAL SUBSTANTIATION IN THE RECORD AS TO THE DISCRIMINATORY APPLICATION BY THE CITY OF CANTON OF ITS ZONING ORDINANCES AGAINST MENTALLY RETARDED PERSONS.

Petitioners exaggerate, if not in fact completely distort, the question presented by representing to the court that the City of Canton has prohibited mentally retarded persons from living in "family homes" in its two-family residential districts while permitting college students, elderly persons and other groups of unrelated persons to live in the same districts. This allegation is based not upon a showing in the record of such facts, but rather upon Petitioners' artful cross-examination,

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Here we find that the provision of the Canton zoning ordinance which would prohibit the establishment and operation of this residential facility within a R-2 zoned area is a reasonable exercise of the police power granted to municipalities pursuant to Section 3, Article XVIII of the Ohio Constitution.

The overall Canton zoning ordinance seemingly provides for a comprehensive plan for the growth and development of the city. It may be concluded that the specific section here involved has been enacted as a reasonable part of the overall zoning plan, and it has not been shown that such provision is arbitrary, capricious or discriminatory in its operation. We find that such section of the zoning ordinance does not forfeit an owner's rights or deprive him of the reasonable free use of his property. Accordingly, we hold that such section of the ordinance does not violate Section 19, Article I of the Ohio Constitution, nor the Fourteenth Amendment to the United States Constitution, and therefore we find the provision to be constitutionally valid. 63 Ohio St. 2d at 273-74.

through the use of hypothetical questions, of the City of Canton's Zoning Inspector. Cross-examination of the City's Assistant Planning Director revealed that in fact such discrimination was not practiced. [5]

The record in this case is totally devoid of any showing by petitioners that any such policy by the City of Canton, or even any single act of such kind of discriminatory conduct, as alleged in their question presented to this Court, existed.

Respondents consequently contend that the record does not support the question presented and that a writ of certiorari should be denied.

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[5] The following portions of testimony are excerpted from the record transcript testimony of Mr. James Bowe, Assistant Director of the Department of Planning for the City of Canton:

CROSS-EXAMINATION BY MR. GUENDELESBERGER:

Q. Mr. Bowe, you were present during Mr. Pace's testimony I went through certain hypotheticals with him as to various types of living situations and what they would be considered if they were to locate in a R-2 residential district. I wonder if I could just go through those same hypotheticals with you and see how your answers compare with his in terms of whether these living situations would be family, single housekeeping, whether they would be permitted in a R-2 district. I think I started out asking him whether under the 1977 definitions whether I could own that home live there with a brother and sister?

A. That's your question sir?

Q. Yes.

A. Yes you could.

Q. R-2 permitted use as a family?

A. Yes.

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Q. If you found out that I was living there with four or five friends, you got a complaint, there's five unrelated people living next door to us violating zoning, what are you going to do about it, its an R-2 district so you came out to my residence where I'm living with my four friends none of us related, what would you do to determine whether we could continue to live there or whether you in forcement of the zoning codes at a neighbor's request would come in attempt to enjoin us from continuing our residence?

3. THE QUESTION PRESENTED LACKS FEDERAL CONSTITUTIONAL SIGNIFICANCE.

Respondents deny that this is a proper case for a writ of certiorari because the legal significance of the case, in terms of federal law, is limited. The litigation below focused on state constitutional issues, involving important "home rule" issues. The question presented by petitioners, as previously discussed, was never specifically raised below and the federal constitutional law virtually ignored.

A. I think we would have to employ the criteria established both under family and under rooming and boarding house. If you as the owner for instance as long as it's hypothetical, if you as the owner were charging the individuals rent or consideration, if they were unrelated to you, and whether or not you were offering your residence for living purposes. If one of your friends moved out would you secure another individual to take his place, if it would meet these criteria I think we'd probably refer that to the law department for an opinion, we'd probably look at it as a rooming and boarding house. All three or four of you living there jointly, sharing expenses and duties, it would be a gray area as whether or not you'd be considered a family.

Q. Would you look to see if we were living as a single housekeeping unit?

A. I think that would probably be one of the things to be looked at in a situation like that.

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Q. You're saying then that if these people should pay consideration to me that that would be a factor, may be a deciding factor in determining if that's a boarding house rather than a family?

A. That would be a factor, yes sir.

Q. Would that be a decisive factor?

A. That among the other factors, all together would tell whether it was a rooming or boarding house.

Q. In a R-2 district, if I own that home, I don't live there, I just rent it to four or five of my friends, you get the complaint, you go out, you investigate the situation, what factors, same factors and what would be the determination?

The question concerning the application of the City of Canton's zoning ordinances to prohibit Siffrin's "family home" from a two family residential district is not a constitutional question, but rather a definitional and factual one.

On the facts contained in the record the Ohio Supreme Court ruled as follows in regard to this issue:

> Here, based upon the facts within the record, some of which have been alluded to previously, we conclude that residents of these licensed facilities may not reasonably be includable within the definition of "family" as set forth in the Canton zoning code. We do not perceive this facility, and its statutorily mandated purposes and duties, to be likened to what is reasonably

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A. Again, if those four individuals you as an absentee owner renting the home if the four individuals would move in jointly together sharing all expenses, sharing the home and the duties of the home, it could be considered as a family.

Q. Make any difference if some of the persons I were renting to were mentally retarded?

A. No.

***

Q. I live in an R-2 district take in two unrelated aged persons, they pay me fair share of the rental cost of the home and the upkeep, I also do some cooking for them, offer them some personal assistance in dressing, et cetera?

A. You'd be the owner of a home living in a R-2 district, you would take aged people in and provide them a place to stay and other services, you'd have a boarding house situation.

Q. That wouldn't be within the definition of family?

A. No sir.

Q. Persons living together as a single housekeeping unit? I hope I make that clear to you the situation we are living as a single housekeeping unit?

A. You may be living as a single housekeeping unit, again the definition of family distinguishes rooming or boarding houses, it employs the fact an operator and compensation are concerned.

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thought of to be a single housekeeping unit. We believe the facts show that these clients of Siffrin would not be residing in this dwelling unit as a single housekeeping unit in the same sense as would a group of individuals who had joined together in these premises in order to primarily share the rooming, dining and other facilities. The emphasis in such an instance may be placed upon the dwelling aspect of the unit, and upon the fact that those who are living within that structure are sharing and maintaining a household as a single unit.

We conclude based upon all the evidence that the Siffrin facility would be established not for the prime purpose of eight people sharing a dwelling place, but primarily for the purpose of bringing together a group of developmentally disabled persons for their training and education in life skills, and for the establishment and furnishing of a professional plan of habilitation for each client developed by the licensed operator and implemented through the director of such facility and his staff of inter-disciplinary personnel trained and equipped for this purpose. The individualized care and training of these clients who are the resident participants of this program would reasonably appear to be the basis of this program sought to be located at this site.

We do not believe that the operation of this facility constitutes a "family" within the definition of the Canton zoning code. 63 Ohio St. 2d at 268-69.

Respondents contend that this question, being definitional and factual in nature, is not appropriate for this Court to determine.

4. THE DECISION OF THE OHIO SUPREME COURT BELOW IS NOT IN CONFLICT WITH ANY DECISIONS OF THE UNITED STATES SUPREME COURT.

No previous decision of the United States Supreme Court suggests the result argued for by petitioners in the instant matter. Petitioners' reliance, for example, on *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), is misplaced in the context of the present case. Canton's ordinance does not, either on its face or in its application, deny a grandmother from living with her grandchildren, as did the East Cleveland ordinance struck down in *Moore*. The rationale of *Moore* rests heavily on the court's recognition that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition," 431 U.S. at 503, "family" being further defined in that opinion to mean "the tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children." 431 U.S. at 504.

That decision does not explicitly recognize "economic" and "emotional" needs as significant bases for the tradition of the extended family, as argued by Petitioners at page 11 of their petition, and does not provide support for their argument that a proposed "family home" for the developmentally disabled located in the State of Ohio, with its statutorily mandated purposes and duties, is to be considered a "family".

5. THE DECISION OF THE OHIO SUPREME COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR WITH THE DECISIONS OF ANY COURTS OF APPEALS.

Petitioners argue that the decision of the Ohio Supreme Court conflicts with the decisions of two state courts of last resort in *Berger v. State*, 71 N.J. 206, 364 A. 2d 993 (1976), and *City of White Plains v. Ferraioli*, 34 N.Y. 2d 300, 313 N.E. 2d 756 (1974). These cases, however, are distinguishable.

In *Berger v. State*, involving the proposed location contrary to local zoning of a state operated group home for eight to twelve multi-handicapped, preschool children in a single-family residential zone, the court upheld the intended use on the narrow ground that state agencies were immune from municipal zoning. 364 A. 2d at 999-1000. The court went further and also held the local zoning ordinance definition of family, which defined "family" as persons related by blood, marriage, and adoption, as too narrowly restrictive and thus invalid on substantive due process grounds. 364 A. 2d at 1002. However, this determination is not relevant to the present case since the City of Canton's ordinance does not contain such requirements.

The Court in *City of White Plains v. Ferraioli* found that the intended location, again contrary to local zoning, of a "group home" composed of a husband and wife, their two natural children, and ten foster children, in a single-family residential district, was a proper use in that this particular household unit was closely akin, if not identical, to a traditional family. This use, the court held, met the test of a "single family" developed by the

court, i.e., "a group headed by a householder, caring for a reasonable number of children as one would be likely to find in a biologically unitary family". 313 N.E. 2d 759. *City of White Plains* is thus factually distinguishable from the instant case, in which the Ohio Supreme Court found the proposed use to be institutional in nature, rather than akin to a "traditional family."

The instant case is also distinguishable from and not in conflict with the decisions of the Federal Courts of Appeals cited by petitioners, *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (6th Cir. 1927), *cert. denied*, 277 U.S. 569 (1927) and *Women's Kansas City St. Andrew Society v. Kansas City*, 58 F. 2d 593 (8th Cir. 1932). *Village of University Heights* involved the refusal of the local planning and Zoning Commission of the Village of University Heights to permit use of certain residential land in the Village for an orphanage, which use otherwise met all zoning requirements, for the reason that "the public convenience and welfare would not be served by the intended use." 20 F. 2d at 742. In *Village of University Heights*, no substantive provisions of the local zoning ordinance prohibited the use other than the discretion of the Commission and no facts were found to justify the denial; in *Siffrin*, however, the proposed use is specifically prohibited by ordinance if it does not qualify as a "family" and the facts as determined by the trier of fact and the Ohio Supreme Court did not support it to be a "family".

Women's Kansas City St. Andrew Society similarly involved the discretionary authority of the Board of Zoning Appeals in refusing to permit location for a philanthropic "old ladies home" in a one and two-family zoned district, where philanthropic uses were permitted

conditionally "provided such location will not seriously injure the appropriate use of neighboring property." 55 F. 2d at 593. Again, the denial by the local board was solely discretionary, as in *Village of University Heights*, and consequently the rationale thereof is not applicable to or in conflict with the present case.

CONCLUSION

For the foregoing reasons, Respondents, Alex J. and Mary L. Garcia and the City of Canton, respectfully request that the writ of certiorari to review the judgment of the Ohio Supreme Court, dated July 30, 1980, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were served by regular United States mail on this _____ day of January, 1981, to the following listed persons: William J. Brown, Attorney General of the State of Ohio, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; George Stricker, Jr., Assistant Attorney General, Attorney for the Petitioner, Rudy Magnone, Ph. D., State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; Larry Zink, Esq., Attorney for Petitioner, Siffrin Residential Association, 3711 Whipple Avenue, N.W., Canton, Ohio 44715; and John Guendelsberger, Esq., Attorney for Petitioner, Ohio Legal Rights Service, 8 East Long Street, 6th Floor, Columbus, Ohio 43215. I further certify that all parties required to be served have been so served.

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